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SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1348

J. M. FIELDS, INC.,
Petitioner,

vs.

PETER J. BRENNAN, SECRETARY OF LABOR
UNITED STATES DEPARTMENT OF LABOR,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Chamber of Commerce of the United States of America respectfully moves, pursuant to Rule 42 of this Court for leave to file the attached brief *amicus curiae* in support of Petitioner in the instant case.

The Chamber is a federation consisting of a membership of over 3,700 state and local chambers of commerce and trade and professional associations, a direct business membership in excess of 38,000 and an underlying membership of approximately 5,000,000 business firms and individuals. It is the largest association of business and professional organizations in the United States.

The Chamber regularly represents the interests of its member-employers in important labor relations matters

in this Court vitally affecting those interests. Such representation constitutes a significant aspect of the Chamber's functions. Accordingly, the Chamber has sought to advance those interests in a wide spectrum of labor relations litigation.*

The instant proceeding is of particular concern to the Chamber's members, a number of whom conduct their business on a widespread geographic, multi-establishment basis and are, therefore, directly affected by the decision below, interpreting the scope of injunctive relief under the Equal Pay Act.**

The issues of primary concern to the Chamber and its members, and, indeed, of significant national importance relevant to the interpretation of the EPA presented herein are:

1. Whether isolated instances of non-willful violations, involving one job classification, at one or a few locations of multi-establishment operations, are a sufficient predicate upon which a nationwide injunction may be imposed upon all of the employer's locations; and

2. Whether, despite a multi-establishment employer's affirmative efforts to secure chainwide compliance with the

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* *E.G., Corning Glass Works* v. *Brennan*, No. 73-29; *Geduldig* v. *Aiello*, No. 73-640; *William E. Arnold* v. *Carpenters*, No. 73-466; *Howard Johnson Company, Inc.* v. *Detroit Joint Executive Board, Hotel and Restaurant Employers and Bartenders International Union AFL-CIO*, No. 73-631; *Gateway Coal Company* v. *United Mineworkers of America, et al.*, —— U.S. —— (No. 72-782, Jan., 1974); *Super Tire Engineering Company, et al.* v. *Lloyd W. McCorkle, et al.*, No. 72-1554; *Marco DeFunis* v. *Odegaard*, No. 73-235; *Corning Glass Works* v. *Brennan*, No. 73-29; *N.L.R.B.* v. *Bell Aerospace Company Division of Textron, Inc.*, No. 72-1598; *Boys Markets* v. *Retail Clerks Union*, 398 U.S. 235 (1970); *N.L.R.B.* v. *The Boeing Company, et al.*, 93 S. Ct. 1952 (1973); *N.L.R.B.* v. *Granite State Joint Board*, 409 U.S. 213 (1972); *N.L.R.B.* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 917 (1971).

** Equal Pay Act of 1963 (hereinafter the EPA or the act), 29 USC Sec. 206(d).

Act, a failure to police those efforts, which results in isolated violations with respect to one job classification at one or a few locations, is evidence of a willful conduct sufficient to warrant a nationwide injunction involving all job classifications throughout the country.

Despite the fact that the only violations of the EPA alleged and found by the District Court below were nonwillful, involving a single job classification at three out of Petitioner's then sixty-six stores, the Court of Appeals issued a nationwide injunction, enjoining Petitioner from engaging in future violations in *any and all* job classifications in *all* of its stores. The effect of an injunction of such broad scope is to subject a multi-establishment employer to civil and criminal contempt for any future violation—regardless of how unintended or mistaken—engaged in by local management at any location.

The far reaching consequences of the Court of Appeals' decision is of particular significance to the Chamber and its members in that the imposition of such drastic relief, without factual predicate and, in fact, based in part on the employer's unsuccessful efforts to secure chainwide compliance with EPA, arbitrarily creates a presumption of guilt that could never be overcome and that is contrary to the express language and policy of the Act. Accordingly, the Chamber is vitally concerned that the Court consider the issues presented by the instant case. Further, because of its broad representation of employers, the Chamber is in a position to present arguments to the Court concerning those issues that might not otherwise be advanced by the parties.

WHEREFORE, for the foregoing reasons, the Chamber of Commerce of the United States respectfully requests that this Motion for Leave to File an Amicus brief be granted.

Respectfully submitted,

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AS AMICUS CURIAE, IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS

The interest of the *amicus curiae* is set forth in the foregoing Motion.

REASONS FOR GRANTING THE WRIT

I.

THIS COURT HAS NEVER CONSIDERED THE SCOPE OF INJUNCTIVE RELIEF AVAILABLE UNDER THE EQUAL PAY PROVISIONS OF THE FAIR LABOR STANDARDS ACT

The instant case presents important questions of first impression involving interpretation of the Equal Pay Act of 1963.[1] Specifically, the issues raised by the instant case seek interpretation of the scope of injunctive relief available to the Secretary of Labor under the Act, and the bases, if any, that would sustain the imposition of such extreme relief as was granted by the lower court herein.

Since the Secretary, charged with the responsibility of administrating the Act and seeking appropriate remedies for violations thereof, apparently feels that blanket injunctive relief is necessary and appropriate whenever it is determined that a national multi-establishment employer has engaged in isolated violations,[2] consideration by

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[1] Section 6(d) of the Fair Labor Standards Act of 1938 as added by the Equal Pay Act of 1963, 77 Stat. 56, 29 USC Sec. 206(d).

[2] Recently, the Secretary has embarked upon a campaign advocating the need for blanket injunctive relief in virtually every equal pay case brought against a national employer. See, *Hodgson* v. *Robert Hall Clothes, Inc.*, 326 F. Supp. 1364 (D.C. Del., 1971), *aff'd, in part and reversed in part*, 473 F.2d 589 (CA 3, 1973), *cert. denied*, —— U.S. ——, 21 WH299 (1973) [The Secretary did not appeal the District Court's adverse ruling with respect to his request for a blanket injunction, and this issue was not, therefore, considered on appeal]; *Hodgson* v. *American Can Co.*, 440 F.2d 916 (CA 8, 1971); *Hodgson* v. *City Stores, Inc.*, 332 F. Supp. 942 (M.D. Ala., 1972), *aff'd. sub nom, Brennan* v. *City Stores, Inc.*, 470 F.2d 235 (CA 9, 1973), *rehearing en banc denied*, —— F.2d ——, 21 WH 317 (CA 5, 1973); *Hodgson* v. *Food Fair Stores, Inc.*, 329 F. Supp. 102 (M.D. Pa., 1971); *Brennan* v. *Corning Glass Works*, 474 F.2d 266 (CA 2, 1973), *cert. granted*, Sup. Ct. Case No. 73-29 [In *Corning*, the Second Circuit reversed the District Court's

this Court of the Secretary's expansive interpretation of the Act is essential to provide the necessary guidelines required by the lower courts, the Secretary, and those in the business community who are subjected to such burdensome and extreme orders.

II.

THE LOWER COURT ERRONEOUSLY AND IMPERMISSIBLY DECIDED IMPORTANT QUESTIONS OF LAW HAVING SUBSTANTIAL IMPACT ON THE FUTURE ADMINISTRATION OF THE ACT

A. Absent Evidence Of Chain-Wide Policy Or Proven History Of Proclivity To Violate The Act, Isolated Violations Are An Insufficient Predicate For The Issuance Of A Nationwide Injunction

The specific language of Section 6(d)(1) of the Act,[3] unlike the minimum wage and overtime provisions of the Fair Labor Standards Act, contains two unique features.

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grant of a blanket injunction which would have extended to Corning's 26 locations. The Secretary did not seek review of the injunction issue in this Court]; *Hodgson* v. *Sears, Roebuck and Co.*, —— F. Supp. ——, 20 WH 611 (WD Ky. 1972).

[3] Section 6(d)(1) provides: "No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, that an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee."

First, the Act confines proscription only to sexually discriminatory pay practices between employees working within the same "establishment."[4] Second, the Act requires job comparison to determine whether the lower paid employees are performing "equal work on jobs the performance of which requires equal skill, effort and responsibility and which are performed under similar working conditions."

Thus, before the proscriptions of the Act attach, it must be established by evidence that the three prerequisites for equality—skill, effort and responsibility—of the jobs being compared, exist.[5] The lower court herein has itself recognized the necessity of establishing, on a job by job basis, the evidentiary and factual existence of these three essential requirements, *Hodgson* v. *Brookhaven General Hospital*, 436 F. 2d 719 (CA 5, 1970), and has rejected, on prior occasion, the Secretary's contention that such analysis could be dispensed with. *Hodgson* v. *Golden Isles Nursing Home, Inc.*, 468 F. 2d 1256, 1258 (CA 5, 1972).

In the instant case, however, the court below disregarded both the "establishment by establishment" and "job by job" criteria in determining that a nationwide injunction—encompassing not only the job category in question, but also each and every job classification in the

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[4] This unique feature of the Equal Pay Act is confirmed in the interpretive regulations issued by the Wage and Hour Administration. Sec. 29 CFR Sec. 800.104. As interpreted by the Administrator, the term "establishment" is construed under the Fair Labor Standards Act to mean a single "unit store". Sec. 29 CFR Secs. 800.103; 779.304. In construing the Fair Labor Standards Act, the Administrator's interpretive regulations are entitled to substantial weight. *United States* v. *American Trucking Assns.*, 310 U.S. 534, 549 (1940); *Idaho Sheet Metal Workers* v. *Wirtz*, 383 U.S. 190-205 (1966).

[5] As interpreted by the Wage-Hour Administrator, the terms "equal skill, effort and responsibility" refer to three separate tests. 29 CFR Sec. 800.122.

Petitioner's chain throughout the country—was appropriate.

The *Amicus* recognizes that when evidence establishes, and the factual findings disclose, the existence of unlawful wage *policies*, or the employer has a past history of repeated violations at a large percentage of his establishments,[6] there may be a basis for issuance of an order sufficiently broad to assure compliance with the Act. However, in the absence of such basis, a court errs in issuing a broad injunction, the scope of which has no relationship to proven violations of the statute in question. *United States* v. *W. T. Grant Co.*, 345 U.S. 629 (1953); *N.L.R.B.* v. *Express Publishing Co.*, 312 U.S. 426 (1941).

In the instant case, the lower court found no policy or cumulative history of past violations. On the contrary, the Court acknowledged Petitioner's pursuit of a chain-wide program to secure compliance with the Act and the only proven violations were isolated instances reflecting, at the most, mistakes or negligence of local management. The court rationalized its broad order by relying on "administrative necessity",[7] and by designating the Petitioner's failure to prevent isolated violations, when it was aware of the Act, as *willful* conduct justifying the imposition of contempt liability in the event of any future violation, no matter how unintended or remote.

In support of this latter rationale, the lower court relied upon the test it formulated for "willfulness" in *Cole-*

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[6] *Wirtz* v. *Atlas Roofing Manufacturing Co.*, 377 F.2d 112, 116 (CA 5, 1967).

[7] "It would frustrate the broad purposes of the FLSA [Fair Labor Standards Act] in suits involving large corporate defendants with extensive branch operations to require the Secretary to investigate and prove violations in all or substantially all of the defendant's branches to justify the issuance of a chain-wide injunction. Considerations of administrative necessity are persuasive as warranting the chain-wide injunction issued below." *Brennan* v. *Fields, Inc.*, 488 F.2d 443, 21 WH409, 414 (CA 5, 1973).

man v. *Jeffy June Farms, Inc.*, 458 F. 2d 1139 (CA 5, 1970), wherein the court held: "Stated most simply, we think the test should be: Did the employer know the FLSA was in the picture?" *Id.* at 1142. Aside from the impression of such a vague "test", the lower court's "leap" from the mere fact of knowledge of the existence of the EPA to the conclusion that the few isolated violations herein were willful, bypasses the essential element of intent. Mere knowledge does not equal intent where, as here, there was no evidence of an unlawful policy or proclivity but, rather, evidence of a sincere effort to comply with the Act. Similarly, the hue and cry of "administrative necessity" can not supplant the due process need for proof. The consequences of such reasoning would in serious ways, as demonstrated below, seriously restructure the fundamental character of the Act and impose intolerable and impermissible burdens on every national multi-establishment employer in the country.

B. The Lower Court's Decision Shifts The Burden Of Proof, Creates A Presumption Of Guilt And Renders The Act Punitive

As the lower court has recognized, the Secretary has the burden of proving "equality of work and inequality of pay" for each job classification challenged. *Hodgson* v. *Brookhaven General Hospital*, *supra*, and has heretofore rejected the *per se* approach it adopted in the instant case. *Hodgson* v. *Golden Isles Nursing Home, Inc.*, *supra*. However, under the approach taken herein the Secretary need only prove a violation at a single establishment among a large chain to obtain a finding of a companywide violation and issuance of a nationwide injunction covering perhaps hundreds of facilities and every single job classification within those facilities. The Secretary is completely relieved of his burden of proof. He could obtain such an order without having to meet the job comparison requirements of proving equal skill, effort

and responsibility—requirements heretofore necessary to establish the existence of a violation. Further, the *per se* approach vitiates any local differences which might render the Act inapplicable to any job in question or render any pay differential with respect to that job exempt.

That Congress recognized the existence of an "establishment by establishment" criterion is clearly manifested by both the job comparison requirement and the factors providing for exemption of pay differentials based on seniority systems, merit systems, systems which measure earnings by quantity or quality of production, or differentials based on any other factor other than sex. Certainly, for every multi-establishment employer any one or a number of combinations of these factors might be present in some establishment and not in others. If present, there might be differences necessitated by local conditions or labor agreements. Simply, the lower court, in arming the Secretary with a nationwide injunction, permits the Secretary to avoid his burdens of proof and deprives the employer the right to assert defenses based on the legitimate factors which Congress has recognized exist in the business world.

The lower court's decision, its *per se* approach, and its order, in effect, have created a presumption of corporate guill, which after the issuance of the order, subjects local management, never found to have violated the Act before, in contempt sanctions. While the Employer could, in a contempt proceeding, raise the same issues that he could at an initial trial, his burden of proving compliance in the face of a previously issued injunction would be "a heavy one". *Hodgson* v. *Hobard*, 436 F. 2d 1110, 1115 (CA 5, 1971).

As a further consequence of the lower court's action, the Act is rendered punitive rather than remedial. Where, as in the instant case, the harsh remedy bears no reason-

able nexus to the proven violations, thus failing to establish a "cognizable danger of recurrent violation, something more than the mere possibility of a future violation", *United States* v. *W. T. Grant & Co., supra*, at 633, the remedy is punitive. A future violation, no matter how remote renders the employer subject to fine and criminal penalties[8] Such consequences could not have been intended by Congress, and alter the very nature of the Act.

III.

THE LOWER COURT'S DECISION IS IN CONFLICT WITH DECISIONS OF THIS COURT, THOSE OF OTHER CIRCUIT COURTS OF APPEALS, AND ITS OWN, AS WELL

In serving its broad order having no relationship to the violations charged or proven, the decision of the court below contravenes this court's repeated condemnation of such injunctions.[9] Further, both the Second Circuit in *Brennan* v. *Corning Glass Works, supra* and the Eighth Circuit in *Hodgson* v. *American Can Co., supra*, rejected the Secretary's plea for nationwide injunctions where, as here, there was no showing of widespread violations nor evidence of a chainwide policy of discrimination[10] Moreover, the instant decision is in conflict with the Fifth Circuit's own decisions in *Brookhaven General Hospital, supra*, and *Golden Isles Nursing Home, supra*,

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[8] See, e.g., *Tobin* v. *Barreda*, 9 WH 471 (D.C. P.R. 534); *Frost-Arnett Co.* v. *Tobin*, 264 F.2d 246 (CA 6, 1959); *Mitchell* v. *Maynard*, 13 WH 434 (M.D. Ala., 1957).

[9] *N.L.R.B.* v. *Express Publishing Co., supra; United States* v. *W.T. Grant Co., supra; FTC* v. *Henry Broch & Co.*, 368 U.S. 350 (1962).

[10] See, also, *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187, 192 (1949), to the effect injunctive relief is appropriate only from showing of "a proclivity for unlawful conduct" of a "remand of continuing and persistent violations of the Act."

by relieving the Secretary of his burden of proof and approving the *per se* approach with respect to that burden; and *Wirtz* v. *Atlas Roofing Manufacturing Co.*, 377 F. 2d 112 (CA 5, 1967) and *Hodgson* v. *Parks d/b/a Southwestern Guard Service*, 413 F. 2d 1364 (CA 5, 1969), on remand 324 F. Supp. 1297 (SD Tex. 1971), and cases cited therein, where, according to the Fifth Circuit's clearly expressed views, the appropriateness of injunctive relief against future violations of the FLSA rests upon a demonstrated historical proclivity to violate the Act indicative of a policy of disregard for the law.

Because of the significance of the problem presented herein and the conflicts not only between this Court and the Fifth Circuit, and between the circuits, but also among the various contradictory views held by the Fifth Circuit, the need to establish a uniformity that will well serve the courts, the Secretary and all affected employers alike is patent.

CONCLUSION

For the foregoing reasons, as well as those urged by Petitioner, it is respectfully submitted that the Petition for Writ of Certiorari previously filed herein be granted.

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